

STATE OF CALIFORNIA
BOARD OF EQUALIZATION
BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition)	
for Redetermination Under the)	DECISION AND RECOMMENDATION
Hazardous Substances Tax Law of:)	
)	
)	No.
)	
)	
<u>Petitioner</u>)	

The Appeals conference in the above-referenced matter was held by Senior Staff Counsel W. E. Burkett on _____ in Sacramento, California.

Appearing for Petitioner:

Mr. _____

Appearing for the Department
of Toxic Substances Control
(DTSC):

Ms. Marguerite Mosnier
Staff Counsel

Appearing for the Environmental
Fees Division (EFD) of the Board:

Mr. Louie E. Feletto
Supervising Tax Auditor

Protested Item

The liability is:

Hazardous waste storage/treatment fee \$

Contentions of Petitioner

1. The fee is not applicable because the application for permit was withdrawn and no business operations were conducted.
2. An employee of the Department of Health Services advised that the action did not constitute a taxable permit application.

Summary

The petitioner is a corporation engaged in the business of collecting used oil by-products.

The petitioner seeks redetermination of a medium facility hazardous waste storage/treatment fee in the amount of \$. The fee was assessed pursuant to a determination by the Department of Health Services (Department) that petitioner had applied for a permit to operate such a facility.

The petitioner contends that the fee is not applicable because the petitioner never operated on the site and the application was withdrawn.

It appears from the record that the petitioner originally sought approval of a facility to be located on . . . Road in . . . California. This required approval of a number of local agencies and various conditions were attached by the agencies in the approval process. Consequently, petitioner modified and transferred its permit application to a new site located at . . . California. (See letter to Department of Health Services from . . . of petitioner, dated . . . , attached hereto as Exhibit A and incorporated herein by reference.) Still later, the petitioner abandoned its attempt to build a facility at the . . . location. (See letter to Department from . . . of petitioner dated . . . , attached hereto as Exhibit B and incorporated herein by reference.)

Petitioner also contends that a project engineer of the Department told its representative that the filings did not amount to an application for a hazardous waste facilities permit. No independent evidence has been submitted in support of this contention.

The Department's position is that the petitioner did, in fact, make an application for the above referenced permit and is therefore subject to the fee even if the application for a permit was withdrawn (citing Health & Safety Code Section 25205.7(a)).

The Department has submitted a copy of a part A and part B permit application for the . . . location dated December 12, 1990, and a business plan for the facility's operation. (See Exhibit A, hereto). It has also submitted a copy of a revision of the application dated October 16, 1991.

The Department now concedes that the fee should have been based upon the schedule for the year, 1990-91 and reduced to . A reduction of \$ is thus agreed to.

The Department argues that the giving of erroneous information by an employee does not absolve the petitioner from the fee obligation either by specific statute or under the general laws of this state or country.

Analysis & Conclusions

The fee in question was assessed pursuant to the provisions of the California Hazardous Waste Management Act. The applicable provision of the act is found in Health and Safety Code Section 25205.7 which reads in pertinent part as follows:

"25205.7. Application fees; facility permit; variances; certification.

(a) The board shall assess a fee for any application for a new hazardous waste facilities permit, a permit for a hazardous waste, a variance, or a permit modification issued by the department pursuant to this chapter or the regulations adopted pursuant to this chapter. The board shall also assess a fee for any hazardous waste facility which intends to operate pursuant to a permit by regulation governed by this chapter or the regulations adopted pursuant to this chapter, which shall be due and payable upon the facility's notification to the department of its intent to operate in this manner. Except as provided in subdivision (i), the board shall not assess a fee pursuant to this section for an application for a hazardous waste facilities permit for a hazardous waste facility which has been previously operating pursuant to a grant of interim status pursuant to Section 25200.5. The fee shall be nonrefundable, even if the application is withdrawn or the permit, variance, or certification is denied..." (Emphasis added.)

It is abundantly clear that the petitioner made an application for a permit to operate a hazardous waste facility. It did not qualify for an exemption or exception under the act. The act itself does not provide for cancellation or refund in the event the applicant does not actually operate. It is therefore our conclusion that the fee was applicable when the petitioner made the application thereby notifying the Department of its intent to operate such a facility. The apparent legislative purpose in requiring the fee to attach at this time is to provide a fund for the administration of the act, including the substantial cost involved in investigating and reviewing the permit application.

The claim that a representative of the Department gave incorrect advice does not provide any basis for cancellation or abatement of the fee. The fee is by statute an excise tax imposed for the exercise of a certain privilege. Our California courts have held that an estoppel based on an erroneous information given by a government official cannot operate to create an exemption for a direct tax that would otherwise be due from the taxpayer. (See Market Street Railway Co. v. State Board of Equalization (1955) 137 Cal.App.2d 87, 103).

Recommendation

It is recommended that the fee be reduced to \$ and redetermined on this amount.

W. E. Burkett
W. E. BURKETT, SENIOR STAFF COUNSEL

DATE

W/Exhibits A & B *Smw*

December 13, 1990

Mr. Farshad Vakili
Department of Health Services
Toxic Substances Control Program
Facility Permitting Unit
Region 1
10151 Croydon Way
Sacramento, California 95827

Dear Farshad:

Enclosed please find the revised Form 1 permit modifying and transferring the present Series "A" permit to our new location at [redacted], [redacted], California 95827. Please also find the business plan for the facility's operations.

[redacted] also requests that the Department of Health Services authorize Underground Tank Storage, Cleaning, and Cutting at the location at [redacted]. The Port of [redacted], in the property lease, includes provisions for Underground Tank Services at this facility location. Therefore, [redacted] is looking to have the state's authorization for these activities.

In reference to the transfer of the original permit, in as much as no facility was constructed at the [redacted] site, no closure report is required. Also, let it be known that the Port Facility is an existing facility not in operation, and never previously operated by [redacted] s. Thank you for your attention to these matters.

Sincerely,

[Signature]
Chief Executive Officer

RECEIVED
NOV 13 1991

EXHIBIT B

November 11, 1991

State Board of Equalization
Hazardous Substance Tax Division
P.O. Box 942879
Sacramento, California 94279-0001

RECEIVED
FEB 10 1992

RE: Fee Assessed 10/23/1991

To whom it may concern:

In reference to the fee assessment of October 23, 1991 for submittal of a storage/treatment facility permit application, F- [redacted] has since withdrawn its application for said permit. Enclosed you will find a copy of the letter sent to Mr. Farshad Vakili of the California Environmental Protection Agency, Facility Permitting Division. Therefore, as the permit was never considered and has been withdrawn, I [redacted] does not feel that the fee assessment is applicable. Please reverse this assessment and clear account number [redacted].

I am requesting, for future reference, the corresponding regulation that specifies that facility fees are required upon submittal of an application, not upon operation of the facility. Is this fee refundable in case the permit is not granted?

Therefore, please adjust our account and respond in writing to my query. Thank you for your time and cooperation.

Sincerely,

Enclosure

FILE

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STATE BOARD OF EQUALIZATION

PEALS REVIEW SECTION (MIC:85)
450 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 324-2655

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BRAD SHERMAN
Second District, Los Angeles

ERNEST J. DRONENBURG, JR.
Third District, San Diego

MATTHEW K. FONG
Fourth District, Los Angeles

GRAY DAVIS
Controller, Sacramento

BURTON W. OLIVER
Executive Director

September 2, 1993

Mr. [REDACTED]

California [REDACTED]

Dear Mr. [REDACTED]

Re: HB HQ [REDACTED]

Enclosed is a copy of the Decision and Recommendation pertaining to the above-referenced petition for redetermination. I have recommended that the petition be granted in part and denied in part.

Please read the Decision and Recommendation carefully. If you accept the decision, no further action is necessary. If you disagree with the decision, you have the following two options:

REQUEST FOR RECONSIDERATION. If you have new evidence and/or contentions not previously considered, you should file a Request for Reconsideration. Any such request must be sent to me within 30 days from the date of this letter, at the post office box listed above, with a copy to the Environmental Fees Division Administrator at the same box number. No special form is required, but the request must clearly set forth any new contentions; and any new evidence must be attached.

BOARD HEARING. If you have no new evidence and/or contentions, but wish to have an oral hearing before the Board, a written request must be filed within 30 days from the date of this letter with Mrs. Mary Ann Stumpf, Business Tax Appeals Analyst, Board Proceedings Division, at the above post office box.